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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BETHUNE PLAZA, INCORPORATED,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS FOR THE USE OF E. ALLEN BERNARDI, DIRECTOR OF LABOR OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois

JURISDICTIONAL STATEMENT

EDWARD A. WILLIAMS*
EDWARD A. WILLIAMS, P.C.
733 North LaSalle Street
Chicago, Illinois 60610
(312) 944-3280

and

ALDUS S. MITCHELL
343 South Dearborn Street
Chicago, Illinois 60604
(312) 347-4310

Attorneys for Appellant

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

I.

Does acceptance of funds from the Unemployment Trust Fund of the United States Treasury by the State of Illinois and imposition and collection of tax by the State of Illinois from Taxpayers, pursuant to 26 U.S.C. §§ 3301, 3302, 3303 and 3304, constitute an illegal withdrawal of funds from the United States Treasury or double Taxation of the Taxpayer, in violation of Article I, Section 8 of the United States Constitution and the XIV Amendment to the United States Constitution?

II.

Did the Congress, with the adoption of the Federal Unemployment Tax Act, 26 U.S.C. § 3301 *et seq.*, "preempt the field" and thus limit State unemployment tax laws to provisions required to subserve the need for which the tax was enacted? If so, does Ill. Rev. Stats., 1983, ch. 48, § 300 *et seq.*, as construed by the Courts of Illinois, take property from employers in violation of the Due Process Clause of the XIV Amendment to the United States Constitution?

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OCTOBER TERM, 1984

BETHUNE PLAZA, INCORPORATED,

Appellant,

VS.

PEOPLE OF THE STATE OF ILLINOIS FOR THE USE OF E. ALLEN BERNARDI, DIRECTOR OF LABOR OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois

JURISDICTIONAL STATEMENT

Bethune Plaza, Incorporated, the Appellant, appeals from the final order of the Supreme Court of Illinois, dated October 2, 1984, denying a Petition for Leave to Appeal from the Judgment of the Illinois Appellate Court, First District, Second Division, holding that the Illinois Unemployment Compensation Act, Ill. Rev. Stats., 1983, ch. 48, § 300 *et seq.*, as applied in this case, is not repugnant to the Fourteenth Amendment of the Constitution of the United States as depriving Appellant of its property without due process of law and denying Appellant reasonable exemptions, deductions, credits or other allowances.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, Second Division, which appears in the appendix hereto, pp. 1a-8a, *infra*, is reported at 124 Ill. App. 3d 791, 464 N.E.2d 1116.

JURISDICTION

The Judgment of the Appellate Court of Illinois was entered on May 29, 1984, and a timely Petition for Leave to Appeal to the Supreme Court of Illinois was filed. On October 2, 1984, the Supreme Court of Illinois entered an Order denying said Petition and this appeal is being docketed in this Court within 90 days from said Order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 3301 RATE OF TAX

There is hereby imposed on every employer (as defined in section 3306(a)) for each calendar year an excise tax, with respect to having individuals in his employ, equal to—

(1) 3.4 percent, in the case of a calendar year beginning before the first calendar year after 1976, as of January 1 of which there is not a balance of repayable advances made to the extended unemployed compensation account (established by section 905(a) of the Social Security Act [42 USCS § 1105(a)]; or

(2) 3.2 percent, in the case of such first calendar year and each calendar year thereafter;

of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)). . . .

26 U.S.C. § 3302 CREDITS AGAINST TAX

(a) **Contributions to state unemployment funds.**

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 3301 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified as provided in section 3304 for the 12-month period ending on October 31 of such year.

(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 6071 to file a return for such year; except that credit shall be permitted for contributions paid after such last day, but such credit shall not exceed 90 percent of the amount which would have been allowable as credit on ac-

count of such contributions had they been paid on or before such last day.

(4) Upon the payment of contributions into the unemployment fund of a State which are required under the unemployment compensation law of that State with respect to remuneration on the basis of which, prior to such payment into the proper fund, the taxpayer erroneously paid an amount as contributions under another employment compensation law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made on the date the return for the taxable year was filed under section 6071.

(c) **Limit on total credits.**

(1) The total credits allowed to a taxpayer under this section shall not exceed 90 percent of the tax against which such credits are allowable.

(B) in the case of a taxable year beginning with the third or fourth consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which—

(i) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year;

26 U.S.C. § 3304 APPROVAL OF STATE LAWS

. . . (3) all money received in the unemployment fund shall except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the

provisions of section 3305(b) immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904 of the Social Security Act (42 U.S.C. 1104 [42 USCS § 1104]);

(4) all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that—

(A) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration; and

(B) the amounts specified by section 903(c)(2) of the Social Security Act [42 USCS § 1103(c)(2)] may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices;

42 U.S.C. § 1104 UNEMPLOYMENT TRUST FUND

(a) **Establishment.** There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund", hereinafter in this title [42 USCS §§ 1101-1108] called the "Fund". The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund, or by the Railroad Retirement Board to the credit of the railroad unemployment insurance account or the railroad unemployment insurance administration fund, or otherwise deposited in or credited to the Fund or any account therein. Such deposit may be made directly with the Secretary of the Treasury, with any depositary designated by him for such purpose, or with any Federal Reserve Bank.

(e) **Separate book accounts.** The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency, the employment security administration account, the Federal unemployment account, the railroad unemployment insurance account, and the railroad unemployment insurance administration fund and shall credit quarterly (on March 31, June 30, September 30, and December 31, of each year) to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date. For the purpose of this subsection, the average daily balance shall be computed—

(1) in the case of any State account, by reducing (but not below zero) the amount in the account by the balance of advances made to the State under section 1201 [42 USCS § 1321], and

(2) in the case of the Federal unemployment account—

(A) by adding to the amount in the account the aggregate of the reductions under paragraph (1), and

(B) by subtracting from the sum so obtained the balance of advances made under section 1203 [42 USCS § 1323] to the account.

(f) **Payments to State agencies and Railroad Retirement Board.** The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment. The Secretary of the Treasury is authorized and directed to make such payments out of the railroad unemployment insurance account for the payment of benefits, and out of the railroad unemployment insurance administration fund for the payment of administrative expenses, and the Railroad Retirement Board may duly certify, not exceeding the amount standing to the credit of such account or such fund, as the case may be, at the time of such payment.

RAISING THE FEDERAL QUESTION

The appellant raised the claim of the unconstitutionality of the Illinois Unemployment Insurance Act (Ill. Rev. Stats., 1983, ch. 48, § 300 *et seq.*) at the earliest possible time in the proceedings below. In its Answer to the Complaint, Appellant claimed that the State Act violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution for failure to provide a credit for unemployment taxes paid to the United States Treasury and that the State Act imposed double taxation on Appellant. The Trial Court, on Motion of Plaintiff-Appellee, struck the Affirmative defenses raising the Constitutional questions.

The claim that the state act was repugnant to the Constitution of the United States was reiterated by Appellant before the Illinois Appellate Court. There it was claimed that the collection of the Illinois Tax would constitute punitive double taxation not intended by the Illinois Legislature and thereby violate the 14th Amendment to the U.S. Constitution by depriving Appellant of its property without due process; the Federal Unemployment Tax Act and the Illinois Unemployment Tax Act were enacted in the same period for similar purposes, to operate in concert and the collection of taxes by the State of Illinois for the same purpose for which taxes were already paid to the federal government would deprive Appellant of property without due process. The Illinois Appellate Court, First District, rejected those claims. Appellant, in a Petition for Leave to Appeal to the Illinois Supreme Court, raised the same questions and asked that Court to settle the question of whether the Illinois Unemployment Tax Act violated the Fourteenth Amendment to the United States Constitution. The Illinois Supreme Court

Denied Leave To Appeal. Thus at every level, the courts of Illinois have considered and rejected the constitutional claim.

STATEMENT OF THE CASE

The Defendant-Appellant, Bethune Plaza, Incorporated (hereinafter referred to as Bethune) located in Chicago, was licensed and began operating in 1969 as a general intermediate home care facility. While operating in an area of chronic unemployment and housing shortages, Bethune serves up to 276 residents and employs approximately 100 persons. Along with basic room and board, Bethune provides rehabilitative nursing care services, 24 hour personal supervision and recreational facilities. Among the 100 staff members are licensed administrators, registered nurses, licensed practical nurses, certified nurses assistants, physical therapists, social workers, licensed activity directors, and dieticians. There is a minimum daily charge of $22.25 per day or $689.75 per month for residents and most pay for their services through the Illinois Department of Public Aid, the Social Security Administration, or other Federal, State, or Local agencies where the individual might be entitled to benefit. In 1975, because of severe cash flow problems, Bethune became seriously delinquent on the 2.7 per cent tax on wages assessed by the Illinois Director of Labor, pursuant to the Illinois Unemployment Compensation Act (hereinafter the "Act" or the "Illinois Act"). Ill. Rev. Stats. Ch. 48, § 300 *et seq.* At the same time, Bethune also became delinquent on the 3 per cent tax on wages due and owing the Federal Treasury pursuant to the Federal Unemploy-

ment Tax Act (hereinafter referred to as F.U.T.A.). I.R.C. of 1954 §3301 *et seq.*

Bethune's cash flow problems were caused in part by its efforts to comply with Federal, State and Local regulations governing nursing home facilities. In 1979, Bethune embarked upon an improvement program which caused the expenditure of nearly one-quarter million dollars over a two and one-half year period. These expenses included the cost of approximately $141,000.00 to install a sprinkler system to abate the hazards posed by fire; the addition of supplemental exterior fire escapes; the installation of interior fire escape lighting, a modern alarm system; and new electrical wiring at a cost of approximately $70,000.00.

During this period of facility upgrading, it became necessary to vacate approximately 20 per cent of the available bed space. Applicable Illinois State Regulations prohibited any reductions in staffing, and at the same time it was prohibited from admitting any new residents. These restrictions, along with the facility upgrade expenditures, caused Bethune to experience a $50,000.00 monthly decrease in revenues at one point. After completion of the facility upgrade program and a return of the normal operating cash flow, but before Bethune could satisfy any delinquencies under the Act, Federal authorities levied on Bethune's assets and forcibly collected approximately $79,000.00 of the delinquent taxes owed F.U.T.A., including interest and penalties. By this action, Bethune was prevented from following the usual and customary procedure of paying the 2.7 per cent State tax owed under the Illinois Act and thereafter crediting the amount paid to the State against the 3 per cent F.U.T.A. tax liability.

This crediting provision is found in §3302 of the Internal Revenue Code of 1954. Conversely, a similar provision is not found in the Illinois Act.

On February 25, 1982, the Director of Labor of the State of Illinois filed a civil action against Bethune pursuant to Section 2207 of the Act, Ill. Rev. Stats. Ch. 48, §686, in order to collect $83,923.49 plus interest, which represented delinquency owed to the State for the same periods as were involved in the taxes collected by the Federal Tax Levy for the delinquency under F.U.T.A. This period of time reflected the following quarters: The first, second, third and fourth quarters of 1975; the first, second, third and fourth quarters of 1976; the first, second, third and fourth quarters of 1977; and the first, second, third and fourth quarters of 1978.

The time for filing a claim for a refund for overpayment of taxes collected by a Federal taxing agent has passed. Bethune did not contest the Director of Labor's initial determination because the amount of the tax due was not at issue. Bethune assumed that amounts paid to Federal tax authorities under F.U.T.A. would be credited against the Illinois liability. Furthermore, Bethune does not have any available state refund remedy.

Upon review of the pleadings and briefs submitted in support of Defendant's Affirmative Defense, the Circuit Court ordered that Bethune's Answer be stricken and judgment be entered for the Plaintiff. The basis for the Court's Order was that by failing to protest the director's determination of liability and raise the constitutional challenge in an administrative hearing, Bethune waives its right to raise the constitutional issue in the Circuit Court. On July 11, 1983, Defendant's Motion to Reconsider was denied.

A timely appeal was taken to the Illinois Appellate Court, First District, where constitutional claims were considered and rejected by that Court. The Illinois Supreme Court denied leave to appeal.

THE QUESTIONS RAISED ARE SUBSTANTIAL

The State of Illinois, pursuant to law, has accepted from the Unemployment Trust Fund, maintained by the U.S. Treasury, funds collected by the Internal Revenue Service from employers in the State of Illinois who had not timely filed state unemployment compensation tax returns. Pursuant to 26 U.S.C. § 3301, the Internal Revenue Service collected an unemployment tax at the highest lawful rate without regard to any credit which may be available pursuant to 26 U.S.C. § 3302. Appellant was subjected to a seizure of funds to pay those taxes with appropriate penalties and interest for the years 1975, 1976, 1977 and 1978. In 1982 the State of Illinois sued to collect under the Illinois Unemployment Tax Act, taxes, penalties and interest for 1975, 1976, 1977 and 1978. If the State of Illinois is successful, Appellant will pay total Unemployment Compensation taxes of approximately 5.7 percent of its payroll for the period in question plus penalties and interest.

The adoption of 26 U.S.C. § 3301 was a Congressional determination that the highest rate of tax for unemployment compensation purposes was 3.2 percent of the total wages paid by an employer. The doctrine of pre-emption prevents the State of Illinois from imposing taxes beyond those contemplated by Congress for the purpose of Unemployment Compensation benefits.

The State of Illinois is either taxing appellant and others similarly situated twice for the purpose of paying unemployment compensation benefits whose source is federal law or Congress is exacting excise taxes from Appellant and other employers similarly situated at a rate different

from that imposed on employers who timely file State Unemployment Compensation tax returns and pay the taxes and timely file F.U.T.A. returns and pay the taxes in violation of Article I Section 8 of the United States Constitution. Alternatively the State of Illinois receives from the Treasury of the United States funds which it is not entitled to have because its statutory unemployment compensation benefit scheme does not satisfy 26 U.S.C. §§ 3303 and 3304. The effect of the foregoing is to take from Appellant funds at a rate which is different from that to which other employers are subject in violation of the requirement of Article I Section 8 that all excise taxes be uniform throughout the United States. The alternative, which is more egregious, is that the State of Illinois is imposing a tax in addition to that imposed by Congress without notice that it intends to do that and thus violates the due process clause of the 14th Amendment, or takes property from Appellant and other employers without proper Notice in violation of the due process clause of the 14th Amendment; or the State of Illinois violates the statutory scheme approved by the Secretary of Labor and is not entitled to collect the taxes from Appellant.

This Court in *New York Tel. Co. v. New York St. Dept. of Labor*, 440 U.S. 519, 99 S. Ct. 1328 (1979) recognized that the pre-emption doctrine did have a place in the consideration of Title IX of the Social Security Act of 1935 and made a similar decision in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 479, 97 S. Ct. 1898 (1977).

The questions raised in this appeal are ones affecting small businesses throughout the United States, because those entities are more likely to be late in making reports required by law. Every business potentially faces the

problems faced by the Defendant-Appellant in this case. This is a question of widespread public interest in this Country.

The defendant has located no case in Illinois construing together 42 U.S.C. § 301 *et seq.* and Ill. Rev. Stats. 1981, Ch. 48, § 300 *et seq.* Indeed not even in the federal jurisdiction have we found instances of similar statutes being construed together. The question presented by this appeal appears to be a question of first impression in the United States and this court ought to settle this important question.

The Illinois Courts have misapprehended the law. In the Appellate Court opinion in this case (Slip opinion 83-1984 pages 3-4), the Court defined "double taxation" and understood that defendant argued that it was paying taxes twice for the same purpose. The Appellate Court, incorrectly read the statute, 42 U.S.C. § 1101 *et seq.*, as not providing credit to the Unemployment Trust Fund, and ignored the plain provisions of 42 U.S.C. §1101(d) providing for transfer of funds to the Unemployment Trust Fund account.

The Appellate Court relied on *Shaw v. Kentucky Unemployment Compensation Commission* (1944) 297 Ky. 815, 181 S.W.2d 697 as presenting and deciding the same issue present in this case. We disagree. The *Shaw case* did not take into consideration the provisions of the federal statute for crediting amounts collected by the federal government to the Unemployment Trust Fund. Moreover, the *Shaw case* involved voluntary action by the taxpayer rather than Involuntary action as in the case at bar.

Other Courts have held that where a state statute is intended to copy a federal statute, the state statute will

be construed to have the same meaning as the federal statute. *Christgau v Woodlawn Cemetery Ass'n., Winona,* 293 N.W. 619 (1940). We submit that the federal statute and the state statute, directed to the same goal and providing for the taxpayer paying twice for the same purpose, offends the constitution. *New York Central Railroad Co. v. Stevenson,* 227 Ill. 474, 115 N.E. 663 (1919).

As construed by the Illinois Appellate Court, the law requires a taxpayer to pay 3.2 percent of its payroll plus penalties and interest to the federal government, which credits the Unemployment Trust Account in some amount, and then requires the taxpayer to pay the State of Illinois 2.7 percent plus penalties and interest for the same purpose thereby giving to the State of Illinois more than eitther Illinois law or federal law requires thus imposing double taxation on behalf of the State where the legislature has not indicated an intent to impose such double taxation. *People ex rel. Lindheimer v. Schweitzer,* 369 Ill. 355, 16 N.E.2d 897 (1938); *Maass v. Higgins,* 312 U.S. 443, 61 S. Ct. 631, 634 (1941). Congress provided for payment of interest 26 U.S.C. § 6601, and addition to the tax and penalties 26 U.S.C. § 6651 *et seq.* If it had intended to do more it would have said so. The Illinois statutory scheme on unemployment compensation either violates the supremacy clause of Article VI of the Constitution or the due process clause of the 14th Amendment. In a tax scheme which relies substantially on voluntary action by taxpayers, it is important that the taxpayer know what the result is likely to be in their dealing with taxes including the possible penalty for failure to carry out those duties imposed by law.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

EDWARD A. WILLIAMS *
EDWARD A. WILLIAMS, P.C.
733 North LaSalle Street
Chicago, Illinois 60610
(312) 944-3280

and

ALDUS S. MITCHELL
343 South Dearborn Street
Chicago, Illinois 60604
(312) 347-4310

Attorneys for Appellant

* Counsel of Record

December 31, 1984

APPENDIX

No. 83-1984

Second Division
May 29, 1984

PEOPLE OF THE STATE OF ILLINOIS for the use of E. ALLEN BERNARDI, Director of Labor of the State of Illinois,

Plaintiff-Appellee,

vs.

BETHUNE PLAZA, INCORPORATED,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable **Earl Arkiss**, Judge Presiding.

PRESIDING JUSTICE HARTMAN delivered the opinion of the court:

Defendant appeals from an adverse judgment in a state action under the Unemployment Insurance Act (Ill. Rev. Stat. 1983, ch. 48, pars. 300, *et seq.*) ("Act") to collect delinquent unemployment insurance taxes assessed against defendant.

This appeal presents as issues whether: (1) the Act is unconstitutional as applied; and (2) the circuit court should have enjoined collection of the tax.

On November 6, 1979, the Director of the Illinois Department of Labor ("Director") notified defendant that a determination and assessment under the Act had been rendered against it for unpaid contributions and interest for the first quarter of 1975 through the third quarter of 1978, totalling $41,372.76. This notice advised defen-

dant that unless it filed a protest and petitioned for a hearing within 20 days, the determination and assessment would become final. A second such notice was served on defendant on August 28, 1980, advising it of its liability for $17,104.06 in contributions and interest, for the fourth quarter of 1978, the second quarter of 1979, and the first quarter of 1980. Both notices were accompanied by blank forms for defendant's use in pursuing its administrative remedies. Defendant neither protested nor petitioned for an administrative hearing with respect to either determination and assessment.

For the period from January 1, 1975 through March 31, 1980, defendant paid the federal Internal Revenue Service $78,956.37 for excise taxes owing under the Federal Unemployment Tax Act (I.R.C. §§3301, *et seq.* (1976)) ("FUTA"). In its brief, defendant alleges that these taxes were forcibly collected after federal authorities levied on defendant's assets to satisfy tax delinquencies.

On February 25, 1982, the State brought the instant action, pursuant to section 2206 of the Act (Ill. Rev. Stat. 1983, ch. 48, par. 686), to collect the unpaid taxes. Defendant's answer and affirmative defense were stricken on motion and the circuit court entered judgment on June 16, 1983, *nunc pro tunc* as of May 10, 1983, in favor of the State in the amount of $83,923.49. After its motion for reconsideration was denied, defendant brought this appeal.

I.

Defendant initially urges that the collection of the Illinois taxes in the instant situation constitutes punitive double taxation, depriving it of property without due process in violation of the fourteenth amendment to the Constitution. Defendant's failure to exhaust its administrative remedies, as here, is ordinarily deemed a waiver of its

right to judicially question the unconstitutional application of a statute. (*Walker v. State Board of Elections* (1976), 65 Ill. 2d 543, 552, 359 N.E.2d 113; *Village of South Elgin v. Waste Management of Illinois, Inc.* (1978), 62 Ill. App. 3d 815, 822, 379 N.E.2d 349.) This waiver issue is not raised by the State. The waiver rule is a restriction on the parties, not the court, and in the interests of a just result the merits of defendant's challenge will be considered. *Hux v. Raben* (1967), 38 Ill. 2d 223, 225, 230 N.E.2d 831; *People v. Walsh* (1981), 101 Ill. App. 3d 1146, 1149, 428 N.E.2d 937.

Double taxation exists where both taxes are imposed for the same period of time, for the same purpose, upon the same taxpayer, and by the same taxing authority. (*People ex rel. Toman v. Advance Heating Co.* (1941), 376 Ill. 158, 163, 33 N.E.2d 206; *People ex rel. Hanrahan v. Caliendo* (1971), 50 Ill. 2d 72, 83-84, 277 N.E.2d 319, *appeal dismissed* (1972), 406 U.S. 965. *See also*, 84 C.J.S., *Taxation* §39 (1954); 71 Am. Jur. 2d, *State and Local Taxation* §31 (1973).) Although not constitutionally forbidden, double taxation is never presumed and is valid only where the legislature has unequivocally intended to impose such taxation. (*Maass v. Higgins* (1941), 312 U.S. 443, 449, 85 L. Ed. 940, 61 S. Ct. 631; *People ex rel. Lindheimer v. Schweitzer* (1938), 369 Ill. 355, 360-61, 16 N.E.2d 897; *New York Central Ry. v. Stevenson* (1917), 277 Ill. 474, 481, 115 N.E. 633.) The taxes at issue here were imposed by separate governmental entities, which of itself would ordinarily put them outside the sphere of double taxation; however, defendant maintains their collection is for the same purpose and will benefit the same governmental entity, the State. We disagree.

Employers are required to pay simultaneously taxes based on gross wages under both FUTA and the Act. FUTA, however, provides for a 90% credit against

moneys collected under approved state laws, including the Act. (I.R.C. §3302 (1976).) This credit device, interpreted as "obviously an invitation to the states to enter the field of unemployment insurance" (*Standard Dredging Corp. v. Murphy* (1943), 319 U.S. 306, 310, 87 L. Ed. 1416, 63 S. Ct. 1067), is allowed only for state taxes *actually paid*; it is disallowed for taxes levied but uncollected (*Quality Coal Co. v. United States* (D.C.W.D. Ark. 1946), 66 F. Supp. 105, 108). Defendant contends that payment of its full FUTA liability, without application of the credit, will result in the State's ultimately receiving from defendant almost twice what it should, claiming that FUTA taxes it paid will eventually be returned to the State. Defendant suggests that a reciprocal credit should be applied against its state tax liability for the "excess" FUTA taxes it paid.

The concerns and goals of both federal and state legislation in this area are identical: relief of the social problems occasioned by involuntary unemployment. (*Steward Machine Co. v. Davis* (1937), 301 U.S. 548, 586-89, 81 L. Ed. 2d 1279, 57 S. Ct. 883; Ill. Rev. Stat. 1983, ch. 48, par. 300; *Lindley v. Murphy* (1944), 387 Ill. 506, 511, 56 N.E.2d 832.) In effectuating this common objective, state and federal laws are closely interrelated and mutually interdependent. (*See Rivard v. Bijou Furniture Co.* (1941), 67 R.I. 251, 21 A.2d 563, 567.) Nevertheless, impermissible double taxation is absent here because significant differences exist in how those goals are accomplished by state and federal taxes.

Taxes collected by Illinois from employers under the Act are deposited by Illinois with the Secretary of Treasury of the United States, who accordingly credits the book account separately maintained for Illinois in the Unemployment Trust Fund ("Fund"). (42 U.S.C. §1104 (1976); Ill. Rev. Stat. 1983, ch. 48, par. 660A.) Moneys thus

credited are then available for the State's payment of unemployment benefits to eligible individuals and State administrative expenses. (42 U.S.C. §1103(c)(1) (1976); Ill. Rev. Stat. 1983, ch. 48, par. 660B.) In contrast, excise taxes collected directly from employers under FUTA (I.R.C. §§3301, *et seq.* (1976)) are credited to the Fund's employment security administration account. (42 U.S.C. §1101(b)(1) (1976).) Only a portion of this account is available to a state to help defray some of its expenses in administering its unemployment compensation law (42 U.S.C. §1101(c)(1)(A) (1976)). The account is also used to cover federal Department of Labor and Treasury Department expenses (42 U.S.C. §§1101(c)(1)(B) and 1101(c)(2) (1976)). Significant also is that the amounts available to individual states under FUTA for payment of administrative expenses are not determined by the taxes actually collected from those states, but are instead determined by the Secretary of Treasury on the basis of state population, the number of persons covered by the particular state law, the estimated costs of administration and other factors deemed relevant to the Secretary. 42 U.S.C. §502(a) (1976).

Unless defendant pays its state tax there will be no funds thereby credited to Illinois' federal Treasury account from which to pay unemployment benefits, the principal objective of these laws. This fact alone compels us to reject defendant's contentions. Further, federal law provides no mechanism whereby "excess" FUTA taxes can be credited to a state's individual account. The "flaw," if any, inheres in the federal scheme, not in the Act, and is beyond the purview of this appeal.

A similar conclusion was reached by the Court of Appeals of Kentucky in *Shaw v. Kentucky Unemployment Compensation Commission* (1944), 297 Ky. 815, 181 S.W.2d 697, the only reported case considering the issue

presented here. There the state unemployment authority had obtained a judgment against the employer for delinquent state unemployment taxes; the employer nevertheless paid the federal government an amount in excess of what otherwise would have been due had the 90% credit been applied. Denying the employer's attempt to enjoin collection of the state tax, the court there emphasized the differentiation in uses made of the state and federally collected moneys and accordingly rejected the employer's contention that the state and federal taxes were the "same tax for the same purpose." (181 S.W.2d at 698.) The employer was seen to "occup[y] the same position with relation to the Federal tax as he would if the State had not taken advantage of the Act of Congress." 181 S.W.2d at 699.

Defendant points to certain provisions of the Act which it claims indicate a legislative intent not to impose a double tax. Section 2700D of the Act empowers the Director to enter into reciprocal arrangements with other governmental entities so that contributions paid by an employer to such other entities can be used to meet the employer's liability under the Act, provided such arrangement permits the crediting of this state's account in the Fund. (Ill. Rev. Stat. 1983, ch. 48, par. 760D.) These arrangements with the federal government are inapplicable here, since the Director cannot require the federal government to credit the State's account in the Fund in contravention of federal law governing the disposition of funds collected pursuant to FUTA. (*See* 42 U.S.C. §1101 (1976).) Although Section 2700E of the Act permits the Director to seek recovery of taxes erroneously paid to another taxing authority (Ill. Rev. Stat. 1983, ch. 48, par. 760E), the federal tax here was not erroneously paid and this section is also inapplicable.

Defendant also suggests that it was not given sufficient notice that a reciprocal credit would not be applied against its state tax liability. Defendant did submit state tax returns for the periods at issue, but did not include payments therewith. Under these circumstances, its assumption that a reciprocal credit would be available was unwarranted. Defendant knew it owed both federal and state taxes. It paid state taxes prior to 1975 and it was impliedly aware of the federal tax credit. When it declined payment of its state taxes because of a "cash flow problem," defendant was obliged to determine the consequences of its action, which deviated from customary tax payment procedure. There is no record showing that defendant made any attempt to contact the State regarding these taxes prior to the instant action. Relevant federal and state statutes demonstrate the lack of reciprocal credit and defendant's potential liability for the full amount of its federal and state taxes. Defendant also is held to the knowledge that either the state or federal authorities, or both, could act to forcibly collect their delinquent taxes.

Under the instant circumstances, the Act neither constitutes an impermissible double tax, nor does it deprive defendant of property without due process. We find no error.

II.

Defendant lastly contends that the collection of the state taxes assessed against it should have been enjoined. It maintains that equity will enjoin the collection of unauthorized or illegal taxes. (*Brown v. Jacobs* (1937), 367 Ill. 545, 549-50, 12 N.E.2d 10.) Defendant's state tax liability is authorized by the Act, however, and does not contravene any constitutional proscriptions.

Defendant urges further that the state tax collection should have been enjoined because it has no adequate remedy at law and might suffer irreparable harm. (*See Lakefront Realty Corp. v. Lorenz* (1960), 19 Ill. 2d 415, 417, 167 N.E.2d 236.) Defendant argues that even had it paid its state tax, it still could not obtain a refund of its "excess" federal tax since the federal statute of limitations governing refunds had expired. (I.R.C. §6511(a) (1976).) Moreover, a state refund, available only where the state tax has been paid in full, was unavailable because the Director's determination and assessment were final. (Ill. Rev. Stat. 1983, ch. 48, par. 681.) The doctrine of exhaustion of administrative remedies does not control, since it appears that the federal government did not forcibly collect its delinquent taxes until after the state tax determination and assessment had become final, and therefore defendant could not have raised the equitable issue in an administrative hearing. (*Chrysler Corp. v. Gunderson* (1979), 77 Ill. App. 3d 558, 560, 396 N.E.2d 101.) Consequently, it insists, absent an injunction, defendant would be required to pay its full state tax liability, a circumstance which could allegedly render it insolvent.

Notwithstanding the foregoing contentions, the state tax was not "illegal," "unauthorized," or procured by fraud, necessary requirements before equity will enjoin a tax collection, even in the presence of irreparable harm and an inadequate legal remedy. (*Clarendon Associates v. Korzen* (1973), 56 Ill. 2d 101, 104-05, 306 N.E.2d 299; *Commonwealth Edison Co. v. Tucker* (1980), 86 Ill. App. 3d 630, 634, 408 N.E.2d 364.) The circuit court did not err in denying defendant equitable relief.

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.

DOWNING and O'CONNOR, JJ., concur.

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 2, 1984

Mr. Edward A. Williams
Attorney at Law
733 N. LaSalle St.
Chicago, IL 60610

No. 60402—People ex rel. E. Allen Bernardi, etc., respondent, vs. Bethune Plaza, Incorporated, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on October 23, 1984.

IN THE
SUPREME COURT OF ILLINOIS

No. 60402

BETHUNE PLAZA, INCORPORATED,

Defendant-Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS FOR THE USE OF E. ALLEN BERNARDI, DIRECTOR OF LABOR OF THE STATE OF ILLINOIS,

Plaintiff-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bethune Plaza, Incorporated, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Illinois, entered herein on October 2, 1984, denying a Petition for Leave to Appeal from the Judgment of the Illinois Appellate Court, First District, Second Division.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ Edward A. Williams

EDWARD A. WILLIAMS
733 N. LaSalle Drive
Chicago, Illinois 60610
(312) 944-3280
and
ALDUS S. MITCHELL
343 S. Dearborn Street
Suite 1709
Chicago, IL 60604
(312) 347-4310
Attorneys for Defendant-Appellant

Dated: December 28, 1984